IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

54119/07

CASE NO: ~~37009/2008~~

29/2/2012

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2012.02.29
DATE

SIGNATURE

In the matter between:

VALUE LOGISTICS LIMITED Plaintiff

and

IRVIN ARNOLD WEINBERG First Defendant

ANDRE DU TOIT Second Defendant

JUDGMENT

MAKGOKA, J:

[1] This is an action for damages and recovery of profits. The plaintiff alleges that the two defendants, its former employees, (i) breached their contracts of employment with it, causing the plaintiff financial loss and (ii) intentional, alternatively negligent disposal or loss of the plaintiff's assets, further alternatively breaches of the defendants' contractual obligations and fiduciary duties, resulting in financial

loss. The essence of the plaintiff's claim against the defendants is that the defendants disposed of the plaintiff's assets and received the proceeds thereof without paying them over to the plaintiff.

[2] The defendants are not legally represented. Their application for a postponement was dismissed by Pienaar AJ on 14 April 2011. The trial commenced on 15 April 2010 until 20 April 2010, when the matter was postponed *sine die*. The trial resumed on 23 May 2011 on which date Du Toit was absent. I was satisfied that a proper notice of set down had been served upon him. I was also informed by Mr. *Kromhout*, counsel for the plaintiff, that Du Toit had earlier during May, attended a pre-trial conference in the company of an attorney. Furthermore, Weinberg conveyed to the court that he had, on the morning of the trial date, spoke to Du Toit, who indicated to him that he was not coming to court. On these considerations, I was satisfied that the trial could continue in Du Toit's absence, which ruling I accordingly made.

[3] The plaintiff's main business is car, truck and forklift rental, warehousing rental, warehousing, distribution, freight, maintenance of vehicles and logistics, generally. The company consists of various divisions, including the Value Car and Truck division, which is based in Midrand. This division is the relevant one to the present proceedings. The two defendants were employed by the plaintiff at the Midrand branch. The first defendant (Weinberg) was the sales manager and the second defendant a (Du Toit) sales representative. Du Toit report to Weinberg, who in turn

reported to the Deputy Chief Executive Officer of the plaintiff, Mr. Danny Marais (Marais).

[4] Two important annexures to the plaintiff's particulars of claim are the following: "POC3", and "POC4. "POC3" is a list of 23 vehicles sold to various entities and individuals named therein. It also reflects the values of the invoice raised for such vehicles and the actual amounts deposited into Du Toit's accounts, which were different. The total value of the invoices raised was R548 371. The actual deposit into Du Toit's account was R 1 030 753, leaving an amount of R482 383 as "under-invoiced". Exhibit "B", the contents of which were admitted by Weinberg and Du Toit, reflects a revised amount of R984 627 as representing a general deficiency in respect of motor vehicles sold without the full proceedings being paid over to the plaintiff. "POC4" reflects 62 vehicles that are unaccounted for. The original claim was for R3 030 530.56. However, this amount was by agreement between the parties reduced to R2 424,424.45, as per Exhibit "B".

Common cause issues

[5] Apart from the above, the following issues are common cause between the parties or are not seriously disputed (appearing from the pleadings, the minutes of the various pre-trial conferences and concessions made during the course of the trial):

(a) Each of the defendants signed a contract of employment setting out the terms of employment and their respective duties;

(b) Weinberg was in control of the used car division at the Midrand branch during the relevant period;

(c) vehicles reflected in annexure "POC3" and "POC4" of the particulars of claim were the plaintiff's property and that Du Toit had sold the bulk of the vehicles reflected in "POC3";

(d) Du Toit operated three bank accounts, namely Nedbank cheque account number 1987426649; ABSA saving account number 9104049290; and ABSA account number 9087263202. He made four payments from either of the accounts to Weinberg in the amount of R72 000, on various occasions between January 2002 and March 2004;

(e) The proceeds of the vehicles referred to in annexure "POC3" and p250 of exhibit "B" were paid into one of the bank accounts operated by Du Toit or paid to him in cash. Du Toit in turn made certain payments from his accounts to the plaintiff;

(f) Du Toit had failed to pay the full proceeds from the sale of all the plaintiff's vehicles into the plaintiff's bank account. Du Toit owed the plaintiff a duty of care and fiduciary duties and that he was obliged to account to the plaintiff for all the monies and /or profits received in respect of the suffered damages in any of its vehicles were being received by the plaintiff in respect of such a vehicle.

(g) The invoice values raised by Weinberg alternatively by Du Toit in respect of the vehicles reflected on annexure "POC3" were lower than the amounts paid into one of the bank accounts operated by Du Toit;

The evidence

[6] Nine witnesses testified in the plaintiff's case, namely Messrs Danny Marais (Marais); Rory Steve Greene (Greene); Johannes Christaan (Basie) Van der Walt (Van der Walt); Hennie Smith (Smith); Gang Zhang (Zhang); Christian Johannes Maurits Myburgh (Myburgh); Shawn Paxton (Paxton); Robert Forfar (Forfar) and Ms Euodia du Toit (no relation to the second defendant). Weinberg testified in his own defence and called no further witnesses. The factual and documentary evidence is largely common cause. As a result what follows is a brief exposition of the salient features of the evidence.

Marais

[7] He was the Deputy Chief Executive Officer (CEO) of the plaintiff during the relevant period. He is presently no longer associated with the plaintiff, as he left the plaintiff in 2006. He was responsible for various departments, including the Value Car and Truck Sales Division in Midrand, where both Weinberg and Du Toit were based. Du Toit reported to Weinberg and Weinberg reported to him. Apart from their salaries and/or commission, Weinberg and Du Toit were not entitled to obtain payment of commission directly from any purchaser of a vehicle.

[8] When a motor vehicle reached a certain age, it would be "defleeted". This is a process in terms of which the vehicle is taken out of the relevant rental depot and put up for sale. When a vehicle was defleeted and put up for sale through the Midrand branch, he and Weinberg would agree on the sale price of that vehicle, which would normally be between its trade and retail value. Once a price had been

established, it would be Weinberg's responsibility to sell the vehicle at that price. Should Weinberg and Du Toit wish to sell the vehicle at a price different to that agreed with him, they had to obtain his consent first. Once a vehicle was sold, the purchase price had to be deposited into the plaintiff's bank account, and the deposit slip faxed to the plaintiff's debtors department. No other account existed for this purpose other that the plaintiff's bank account. Where any commission was payable to either Weinberg or Du Toit, such would be processed once verification of receipt of the purchase price into plaintiff's bank account was made. Such commission would be paid to the individual concerned at the end of the month as part of their salary.

[9] When a vehicle was sold, the transfer of ownership documents had to be signed by Weinberg. The signed change of ownership documents would be accompanied by the registration certificate for the particular vehicle, which would be handed to the purchaser by either Weinberg or Du Toit. Ownership in a vehicle could not be transferred without a registration and signed transfer papers. He further testified that Weinberg was responsible for vehicles placed out on consignment and other dealers when those vehicles originated or fell under the Midrand branch, and that Weinberg had to control those vehicles at the consignment dealerships. He further testified that when a vehicle was on consignment with a dealer, and the dealer had sold the vehicle to a third party, change of ownership could only take place when the Plaintiff had received payment. Only then could the registration documents be handed over and the dealer/purchaser could obtain ownership of the vehicle.

[10] He further testified that there was a filing system at the Midrand premises where the registration certificates and the keys for the relevant vehicles were kept. Weinberg was responsible to keep the keys of the vehicles and the registration certificates in safe custody. According to Marais, invoices were raised either at the debtors department or by Weinberg. When a vehicle was sold, the Plaintiff would be reflected as the seller on the invoice. It could not be anyone else. The person buying the vehicle would be reflected as the purchaser. Marias finally testified that from 19 November 2001, manual invoices were no longer allowed and all invoices had to be generated on the plaintiff's Accpac accounting system, which was a computer-based system. Those employed at the Midrand branch were able to raise invoices on the Accpac system. After the implementation of the Accpac system, Weinberg was aware that he could no longer raise manual invoices since, to the knowledge of Marais at the time, Weinberg followed the new procedures.

Greene

[11] He was employed by the plaintiff during the relevant period as a National Loss Control Manager. He was involved in an investigation pertaining to the sale of the plaintiff's vehicles at the Midrand branch. Initially it included some 1500 vehicles. On 10 December 2004 he conducted a physical audit of all the vehicles that were listed by Weinberg as being in stock at that branch. Armed with such list, he did a physical stock count. Out of the 104 vehicles that were supposed to be in stock, only 10 were physically present. When he enquired from Weinberg as to the whereabouts of the remaining 94 vehicles Weinberg handed to him consignment documents, indicating that some vehicles were on consignment with various dealers. On further investigation of that information, he could only locate about five vehicles

at the dealerships. The rest of the vehicles could not be accounted for by Weinberg, as the dealers supposedly in possession thereof, denied knowledge of the consignment documents handed to him by Weinberg.

[12] Back at the Midrand branch, he located a stock book wherein was recorded a list of the vehicles that were received into stock at that branch. That list included the missing 94. On further investigation, it emerged that those vehicles had been sold to third parties and that the purchase prices had been paid directly to Du Toit. It also emerged that several payments were received Du Toit, exceeding the amounts reflected on the invoices raised on the plaintiff's accounting system. Weinberg's signature appeared on several of the offers to purchase documents. A transaction involving motor vehicle with registration number CSZ 186 EC is a case in point. On 18 March 2002 Weinberg signed an offer to purchase in terms of which the vehicle was sold to Airport Motor for R24 350. On 20 March 2002 an invoice was raised on the plaintiff's system. On 31 July 2002 ownership of the vehicle was transferred to the purchaser. On 7 August 2002 Du Toit issued an invoice to the purchaser for R28 000. The following day, Du Toit banked a cheque in the amount of R28 000 into his personal cheque account. Greene further testified about a list of some 62 vehicles which he was unable to find invoices for, except 3 vehicles which he was able to trace as sold but for which there were no invoices for cash were raised on the plaintiff's system.

[13] During the investigation in early December 2004, he found a number of used and unused manual pre-printed invoice books in a cabinet in the offices of Value Car

& Truck Sales at the Midrand depot. Out of the used ones two were missing, with sequential invoice numbers from 900 to 1000. There were 50 invoices per book, so the two books contained sequentially numbered invoices 901 to 950 and 951 to 1000, respectively. He noticed that a manual tax invoice was utilised by Weinberg in order to sell a vehicle with registration number CVR 578 GP. Invoice number 967 was utilised, which came from one of the invoice books that was missing. The same applies to invoice number 965 in terms of which a vehicle with registration number PCH 014 GP was sold to Mr Hennie Smith of Wonderboom Car & Truck. He also established that a vehicle with registration number HSZ 294 GP was sold to a Mr Zhang, who purchased the vehicle from Weinberg and paid Weinberg an amount in cash. A significant fact pointed out by Greene was that certain of the consignment notes did not tally with the objective facts available. For instance, a consignment note in respect of a vehicle with registration number CVR 578 GP was dated 27 October 2004. However, this vehicle had in fact been sold already in January 2004 to Mr. Hennie Smith of Wonderboom Car & Truck during which Weinberg received cash in the amount of R37 400.00 for the vehicle.

Nicoll

[14] He was an internal auditor of the plaintiff during the relevant period. His duties included fixed assets verification, general auditing and procedures. He was requested to verify the presence of 104 vehicles supposedly at the Midrand Branch. He found only 10, and asked Weinberg of the whereabouts of the rest of the vehicles. Weinberg told him that they were at various dealerships who were selling them on the plaintiff's behalf. He asked Weinberg to contact the dealerships and request those dealerships to fax him the details of the vehicles in their respective

possession. When he received the faxes towards the end of October 2004 they came from Weinberg and related to about 9 or 10 dealerships.

Van der Walt

[15] He was the Group Project Manager responsible for accounting procedures. He wrote a letter dated 19 November 2001 wherein he set out that with effect from December 2001 the plaintiff would covert from manual accounting system to an electronic one. The letter was electronically transmitted by e-mail to a number of recipients, including Weinberg. The letter also instructed that all deposit slips had to bear reference to both the vehicle registration number and the invoice number. He visited the Midrand branch before and after the implementation of the new system and he was satisfied that the system was smoothly implemented. He personally discussed the conversion with Weinberg both before and after implementation. The only issue raised by Weinberg was a problem relating to one of the printers, which was sorted out.

Smith, Zhang and Myburgh

[16] These three witnesses' evidence is almost identical. Each one purchased a vehicle from Weinberg and paid cash directly to Weinberg. Smith testified that he was the owner of Wonderboom Car & Truck, a second hand motor dealer. He sourced vehicles from various sources, including companies like the plaintiff. He purchased three vehicles from the plaintiff, represented by Weinberg on different occasions in June and July 2003. On each occasion he made cash payment for a vehicle. One of the three vehicles was taken by him on consignment. Weinberg

issued and signed manual tax invoices of the vehicles paid for cash, which manual tax invoices also served as receipts, since Weinberg recorded the purchase price on these invoices and endorsed "Pd/Paid" on these manual invoices. The registration and transfer documents were handed to him by Weinberg against cash payment to Weinberg. Zhang purchased a vehicle from Weinberg for R51 500 under the same circumstances as those of Smith. Cash payment was made to Weinberg and no receipt issued, except an endorsement "pd" on the manual tax invoice. Myburgh was Smith's partner at Wonderboom Car & Truck. He testified that he was present when Smith paid cash to Weinberg for the three vehicles which Smith testified about. He further confirmed that Weinberg handed the manual tax invoices to Smith.

Paxton

[17] He was the plaintiff's senior internal auditor, responsible for the auditing of branches nationally. He confirmed Van der Walt's evidence that with effect from December 2001 manual invoices were not allowed and invoices could only be raised on the plaintiff's computer system. Paxton's evidence is also by and large confirmation of what Marais and Greene testified about. He further testified that there were no unallocated deposits in the plaintiff's banking accounts which could possibly relate to any of the missing 62 vehicles. According to him, Weinberg could not give any sufficient indication or explanation as to the whereabouts of the 62 vehicles. He also pointed a continuous delay in invoicing by Weinberg. He also testified about the allocation of payments to invoices, where Weinberg would allocate payment received from one purchaser to an invoice raised in respect of another purchaser. There were also substantial discrepancies between the actual

date of payment by the purchaser and the actual date of allocation of payments to the purchaser's invoice.

Forfar

[18] He testified as an expert. He is a forensic accountant. He compiled a report after conducting a forensic accounting investigation into the activities of the plaintiff's Midrand branch. In his report, he highlighted a few aspects. He concluded that from his investigation, the *modus operandi* of Weinberg and Du Toit was for Du Toit to secure the sale of the plaintiff's vehicles, with the proceeds then deposited into Du Toit's personal bank accounts. Weinberg would subsequently raise sales invoices for the sold vehicles when he and Du Toit planned to pay funds to the plaintiff, which collectively over the period under investigation amounted to substantially less than the proceeds of the vehicle sales deposited into the accounts of Du Toit. He submitted that the fact that Weinberg would receipt and allocate the amounts paid to the plaintiff from Du Toit's bank accounts supports the conclusion that he was aware of the practice passing the sale proceeds through the bank accounts of du Toit.

[19] He also analysed the movements in Du Toit's bank accounts. He noted a high frequency of ATM withdrawals, and concluded that Du Toit and Weinberg early on in the scheme, were unable to make the payments meant to offset the invoices raised by Weinberg in the accounting records of the plaintiff. In an attempt to catch up on the cash flow shortage, Weinberg would delay the preparation of the invoices, even where the vehicles were no longer in his possession. In his view, the "cash rolling" had a snowball effect which never allowed Weinberg and Du Toit the opportunity to

make up on the shortage. Consequently Weinberg had to resort to not raising invoices at all, for vehicles disposed of. This resulted in the general deficiency amounting to R984 627 and the 62 unaccounted for. Forfar opined that had Weinberg Properly implemented the invoicing procedure of the plaintiff, he would have ensured proper control over the plaintiff's vehicles. In that way, ownership of a vehicle would not pass to a third party unless the vehicle had been paid in full, an invoice properly raised and payment allocated against the invoice.

Du Toit

[20] Mrs Du Toit was the administration manager of the plaintiff at the relevant time. She was responsible for the raising of invoices, collecting monies and deposit thereof, as well s reconciliation of accounts. She worked under Weinberg for approximately two months before she was promoted and moved on to another division. Of particular importance in her evidence is her confirmation that that from end November 2001 the new accounting system was fully implemented and manual invoices were no longer to be raised. There were multiple users and invoices could be raised at different branches, the Midrand branch included. Offer to purchase books and manual tax invoice books were kept at the Isando branch and signed for when those documents were issued. She further testified that she was never contacted by Weinberg to reinstate vehicles on the stock lists. She did not have access to the assets as these were managed at Isando. She was in charge of invoice books from May to September 2001, after which they were given to Weinberg, who became responsible therefor. She further denied sending any invoice books instead of offer to purchase books to Weinberg, stating that it would have been highly irresponsible to do so, and she would never have given such an

instruction. She further denied the suggestion by Weinberg that only Pretoria and Isando branches could raise invoices for vehicles, pointing out the initials "RVD" which appeared on the invoices raised at Midrand Branch, which she identified as those of Ronnell van der Westhuizen, who was based at Midrand.

Paxton and Van der Walt recalled

[21] Two witnesses, Paxton and Van der Walt were recalled with leave of the court. Paxton submitted a schedule reflecting the agreed value of 20% below trade of the missing 62 vehicle. Furthermore, he handed up unused two offers to purchase books which were indicative of the fact that during 2003 there was no shortage of offer to purchase books necessitating the use of manual invoices and that Weinberg had in fact continued to use the normal offer to purchase books. Van der Walt's recall was necessitated by Weinberg's allegations that he (Van der Walt) had removed certain deposit books and other documents during an audit. That concluded the evidence on behalf of the plaintiff.

[22] Weinberg then took the witness stand in his own defence. He outlined his general duties and responsibilities as the plaintiff's sales manager. With regard to the missing vehicles, he testified that there were a few occasions where vehicles were invoiced but not paid for. He had warned of vehicles which went missing. During a period when Du Toit was on leave, one of Du Toit's clients phoned and asked for two specific vehicles. He then phoned another dealer to locate those vehicles. He ultimately established that the vehicles were not at any of the dealers. When Du Toit returned from leave the following day, he confronted him about this

issue and phoned more customers, which led him to perceive that there were problems. He then contacted the loss control department of the plaintiff. When Du Toit realized this, he tendered his resignation and just "disappeared". He was not satisfied with the way in which possession of the vehicles was controlled.

[23] Eventually he got hold of Du Toit and they met, during which Du Toit admitted to having being involved in fraudulent activities regarding the plaintiff's vehicles. Du Toit also admitted that he had abused his (Weinberg's) trust of him. A month prior to his resignation he (Weinberg) perceived that he was a suspect. As a result, he gathered substantial evidence in his favour, in case there was a court case against him. These documents were later confiscated by Greene on the day he was requested to leave the employ of the plaintiff. He denied any involvement in the missing vehicle of the plaintiff. With regard to the two payments made to him by Du Toit, he testified that those had nothing to with the plaintiff. They related to two motor vehicles that he had sold to Du Toit in 2000 before he was employed by the plaintiff. That concluded the evidence as Weinberg did not call further witnessed on his behalf.

The submissions

[24] Mr *Kromhout,* for the plaintiff, submitted that the totality of the evidentiary material before court, including the oral evidence, establishes on a balance of probabilities that both Du Toit and Weinberg made secret profits from the sales and/or disposal of the plaintiff's missing vehicles. He argued that Du Toit operated a scheme which was in direct breach of his responsibilities as a sales representatives

and his contractual duty of towards the plaintiff. Weinberg, on the other hand, contended that he was an innocent party, and was unaware of the scheme operated by Du Toit. He only became aware of such scheme shortly before Du Toit resigned. He also blamed the loss on inadequate security measures and Mr Marais (former Deputy CEO)'s iron-fisted managerial approach. He stated that this led to a situation where he did not receive important policy guidelines from the plaintiff's head office, unless those came from Marais himself, for example the e-mail in which new managerial procedures where set out. He further bemoaned the fact that Marais was not joined in the proceedings as a defendant as, according to him, some of Marais decisions led to the losses. At the end of day, Weinberg argued that the plaintiff's claim against him should be dismissed.

<u>The law</u>

[25] I am grateful to Mr *Kromhout* for providing me with a comprehensive overview of case law in his helpful heads of argument. The point of departure is that an employee is under a duty at all times to take reasonable care and exercise expertise in the handling of the property and business of his or her employer. See *Wallace v Rand Daily Mail Ltd* 1917 AD 472 at 482.

[26] In *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler*[1] it was held that once an employer - employee relationship is established, there exists *ex lege* a fiduciary relationship between the two parties. When rendering his or her services

[1] 1971 3 SA 866 (W) 867 - 868

the employee must ensure that his or her services are executed in good faith and that they in no way detract from the relationship of trust. Flowing from the above, it goes without saying that secret commissions received by an employee in the course of his employment or by means of his employment in breach of his fiduciary duty to the employer are deemed to have been received for his employer. See *Games v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) paras 25 – 29.

[27] The principle is that an employee cannot make a secret profit out of anything which belongs to the employer which he possesses merely in a fiduciary capacity. Where he does this, the employer has a remedy against the employee for such profit. It is not necessary that loss or harm or damage should be proved. This is even so though, but for such activity, the employer would not himself made or received the profit in question. See *Uni – Erection v Continental Engineering Co. Ltd*[2] where Nestadt J made a useful overview and exposition of the general principles on this point.

[28] It follows that the employer is entitled, in addition to cancelling the employment contract, to claim damages which he or she may have suffered as a result of the conduct of the employee: See *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[3]. In this regard, the employer's damages would be the difference between his or her present position and the position he or she would have been in had the employee not committed the breach of contract: See *Victoria Falls & Tvl Power Co*

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[2] 1981 (1) SA 240 (W) at 252 -253.

[3] 1981 (2) SA 173 (T).

Ltd v Consolidated Langlaagte Mines 1915 AD 1 *and Versfeld v SA Citrus Farms Ltd* 1930 AD 452.

[29] In *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) para 31, the Supreme Court of Appeal restated the test enunciated in *Kruger v Coetzee*[4] in light of subsequent developments that:-

> "For the purposes of liability *culpa* arises if –
>
> (a) a reasonable person in the position of the defendant-
>
> (i) would have foreseen harm of the general kind actually occurred;
>
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
>
> (iii) would have taken steps to guard against it, and
>
> (b) the defendant failed to take those steps."

<u>Issue for determination and discussion</u>

[30] From the above, it is then clear that the issue for determination is whether Weinberg and Du Toit have breached their fiduciary duties as employees of the plaintiff, either intentionally or negligently. It is common cause that the 62 vehicles went missing. It is further clear that those vehicles were under the direct control of Weinberg and Du Toit as sales manager and salesman, respectively. From the evidence, it is clear that Du Toit operated a fraudulent scheme in terms of which

[4] 1966 2 SA 428 (A) 430

invoices were manipulated to give a false impression that all vehicles sold by him could be accounted for. He admitted to have sold the plaintiff's vehicles and thereafter deposited the proceeds thereof into one of his three bank accounts, and later made payments from those accounts to the plaintiff, which proceeds he failed to pay in full to the plaintiff. I therefore harbour no doubt that Du Toit was behind the plaintiff's losses and he is therefore liable for the damages suffered by the plaintiff.

[31] The position of Weinberg is not much different from that of Du Toit. He has not offered any credible explanation for his role in raising invoices lower than the amounts paid into one of the bank accounts operated by Du Toit. With regard to the 62 missing vehicles, there is direct evidence against him (Weinberg) by Smith, Myburgh and Zhang that he was involved in the cash sales of vehicles to them without raising invoices on the plaintiff's system. This is the most direct and damning evidence against Weinberg. He did not seriously challenge it. Much of his evidence was totally discredited and proved to be false. For example his initial total denial of the fact that invoices were raised at the Midrand branch was proved not only to be wrong, but intentionally misleading. The other false assertion he made was to the effect that there was a shortage of offer to purchase books. This was proved false by the extracts from the plaintiff's offer to purchase book with serial numbers 0951 – 1000. Furthermore, his allegation that Ms Du Toit had provided him with manual invoice books to be used after November 2001 was vehemently and emphatically refuted by Ms. Du Toit. Ms Du Toit could, in any event, not have done that as she was not in control of any manual invoice books during the relevant period. With regard to the general deficiency, Weinberg signed the bulk of the offers to purchase, and was therefore clearly involved in those

transactions. It is inconceivable that Du Toit could have operated the scheme without Weinberg's approval/ knowledge or participation. Either way, Weinberg was either complicity in the scheme or he was clearly negligent in failing to timeously detect Du Toit's scheme.

[32] There are other unsatisfactory aspects of Weinberg's evidence. For example, he failed to explain his delay in invoicing; he failed to explain the incorrect and delayed allocation of deposits; he failed to explain how vehicles had been transferred into the names of third parties long before invoices had been raised on the plaintiff's system; he failed to explain how a vehicle sold to a third party(CVR 578GP sold to Wonderboom Car & Truck) during 2003 still appeared on a consignment note furnished by him during late 2004. The very manner in which Weinberg raised invoices belatedly and allocated payments belatedly and to incorrect invoices is strong indicator that he was not only aware of the cash rolling scheme that was taking place, but that he was an active and willing participant. In the light of all these, his evidence that the four payments received from Du Toit were innocent and for something else, is not probable.

Conclusion

[33] Having regard to the totality of the evidence, I am satisfied that the plaintiff has established its case against both Weinberg and Du Toit respectively, on a balance of probabilities. The amounts of the plaintiff's *quantum* have been agreed upon.

Order

[34] In the result I make the following order against the first and second defendants, jointly and severally, in favour of the plaintiff, the one paying the other to be absolved:

1. In claim "A", payment of the amount of R984 627.00;
2. In claim "B", payment of the amount of R2 242 424.45;
3. Interest on the above amounts calculated at the rate of 15.5% *per annum* from 21 November 2007, being the date of service of summons, to date of final payment;
4. Costs of the suit.

T M MAKGOKA
JUDGE OF THE HIGH COURT

DATES OF HEARING	**: 15 APRIL 2010 – 20 APRIL 2010;**
	: 23 – 27 MAY 2011 & 15 JULY 2011
JUDGMENT DELIVERED	**: 29 FEBRUARY 2012**
FOR THE PLAINTIFF	**: ADV E KROMHOUT**
INSTRUCTED BY	**: RIDGEWAY MERRY & WELDHAGEN INC, BEDFORDVIEW, AND EMMA NEL ATTORNEYS, PRETORIA**

THE DEFENDANTS IN PERSON

(No appearance by the second Defendant as from 23 May 2011).